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NO. 93-314

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

RALPH UNDERWAGER and HOLLIDA WAKEFIELD,
Petitioners,

v.

ANNA SALTER, PATRICIA TOTH, MIMI ROSE, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, AMERICAN PROSECUTORS RESEARCH INSTITUTE, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CHARLES VAUGHAN and JAMES PETERS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a defamation case based on diversity jurisdiction, does the court of appeals' decision pursuant to state law raise an issue appropriate for this Court's discretionary review?

2. As a matter of Wisconsin law, does a public figure plaintiff have the burden of proof of "actual malice" in a defamation case?

3. Do multiple publications of an allegedly defamatory videotape of a nationally broadcast *60 Minutes* news show constitute "actual malice" under Wisconsin law?

PARTIES

Petitioners, Ralph Underwager and Hollida Wakefield are individual citizens of Minnesota.

Respondent Patricia Toth is an individual citizen of Virginia.

The below respondents are not parties to this appeal, but were parties to the proceeding in the U.S. Court of Appeals for the Seventh Circuit:

(1) Respondent National Center for Prosecution of Child Abuse (the "Center") is a project of American Prosecutors Research Institute (APRI), which is an affiliate of the National District Attorneys Association ("NDAA"). APRI and NDAA are non-profit, nonstock corporations incorporated under the laws of the State of Virginia. The Center, APRI and NDAA all have their headquarters and principal places of business at 99 Canal Center Plaza, Suite 510, Alexandria, Virginia 22314.

(2) Respondent Mimi Rose is an individual citizen of Pennsylvania.

(3) Respondent James Peters is an individual citizen of the U.S. Virgin Islands.

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TO THE HONORABLE SUPREME COURT:

The Respondents, PATRICIA TOTH, THE CENTER, APRI, NDAA, MIMI ROSE and JAMES PETERS, respectfully request the Court to deny the Petition for Writ of Certiorari submitted by the Petitioners, RALPH UNDERWAGER and HOLLIDA WAKEFIELD.

OPINIONS BELOW

In a published opinion, the Seventh Circuit Court of Appeals affirmed the Federal District Court for the Western District of Wisconsin decisions (1) dismissing the Center, Rose, and Peters; (2) granting summary judgment in favor of APRI and NDAA; and (3) granting Patricia Toth's motions for reconsideration and summary judgment. The Seventh Circuit's decision is published as *Underwager v. Salter*, 22 F.3d 730 (7th Cir. 1994) and reproduced in the Petitioners' Appendix to Underwager's Petition for Writ of Certiorari ("App."). Two of the district court's opinions also are reproduced in the Appendix.

JURISDICTION

Petitioners seek certiorari pursuant to 28 U.S.C. § 1254(1) of a decision of the United States Court of Appeals for the Seventh Circuit, which affirmed the district court's decisions on April 25, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution is involved in this diversity action.

STATEMENT OF THE CASE

Patricia Toth is a former prosecutor who is employed by APRI as the Director of the Center. In this capacity, she gives seminars on child abuse intervention and prosecution across the United States. On October 31, 1990, she held a workshop in Madison, Wisconsin entitled *"Facts, Fallacies and Hidden Agendas: Current Issues in Child Abuse Intervention"* at the Midwest Conference on Incest and Child Sexual Abuse ("Madison Seminar"). Her workshop was directed at professionals involved in child abuse intervention and prosecution, namely social workers, case workers, prosecutors, physicians, psychologists and law enforcement personnel.

During her two hour workshop, she discussed (1) recently-decided child sexual abuse cases, (2) literature about child abuse and child pornography, and (3) popular experts in the field, including Ralph Underwager. She showed numerous slides of newspaper articles, advertisements, and photographs from periodicals. She also played a videotape of the second half of a *60 Minutes Australia* episode entitled "Witness for Mr. Bubbles," broadcast nationally in Australia on August 5, 1990 (*60 Minutes* episode).

Toth does not appear on or say anything on the *60 Minutes* episode. Rather, the basis of plaintiffs' claim is that Toth defamed Underwager by replaying the nationally broadcast television news show. Nor have plaintiffs sued Toth for saying anything at the Seminar.

It is undisputed by the parties that Toth played only the latter half of the *60 Minutes* episode at her Seminar. Toth believes it highlights four areas germane to child abuse intervention and prosecution: (1) the significance of expert witnesses in child abuse cases; (2) the theory used by the defense in the *Barnes v. Barnes* case in Indiana; (3) competing

and controversial theories advanced in child abuse psychology; and (4) a brief look at a popular expert in child abuse — Ralph Underwager. Toth felt that the twenty-minute portion of the *60 Minutes* episode afforded a unique opportunity for professionals with an interest in child abuse to see how child abuse cases are handled.

The *60 Minutes* episode focuses on the infamous and widely publicized Australian criminal proceeding known as the "Mr. Bubbles" case. An Australian defendant, Tony Deren, was accused of sexually abusing in a hot tub, children who attended his wife's nursery school. Thus, he was dubbed "Mr. Bubbles" in the Australian press. Deren retained Ralph Underwager as his expert witness. Based in large part on Underwager's view that the children who identified Deren as having molested them were too young to give competent testimony, Deren was not committed for trial. This result was extremely controversial in Australia. The general public perceived it as unjust, believing Deren to have escaped justice on a legal technicality.

60 Minutes Australia produced two stories on the "Mr. Bubbles" controversy, the second of which is the subject of this lawsuit. During the summer of 1990, *60 Minutes Australia* reporter, Michael Munro conducted several interviews in the United States in connection with the "Witness for Mr. Bubbles" episode. Mr. Munro interviewed Ralph Underwager, Indiana Attorney Charles Vaughan, Assistant United States Attorney James Peters and Psychologist Dr. Anna Salter. These interviews comprise the twenty minutes of videotape that Toth played. Munro did not interview defendant Patricia Toth.

It is undisputed that Underwager essentially makes his living as a psychologist for use in legal proceedings; that he is paid to consult, and sometimes testify in civil and criminal matters. It is undisputed that Underwager has testified in more

than 200 cases as an expert witness for alleged child molesters throughout the United States, Australia, Canada, England, Holland and New Zealand. In addition, he has made dozens of oral presentations on child sexual abuse, and has made several radio and television appearances regarding child sexual abuse, including appearances on "Phil Donahue" (1985), "Geraldo Rivera" (1991), "Inside Edition" (1992), "The Today Show" (1992), and "Sightings" (1992), to name a few.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied because it does not raise an issue appropriate for the Court's exercise of discretionary jurisdiction. Both lower court decisions are squarely in line with the leading cases on defamation.

The Seventh Circuit correctly ruled that Wisconsin law holds that a public figure plaintiff must show actual malice in a defamation case.

The Seventh Circuit also correctly ruled that Wisconsin law holds that multiple publications of a nationally broadcast *60 Minutes* episode do not constitute "actual malice" in a defamation case.

I. THIS CASE PRESENTS NO ISSUE APPROPRIATE FOR THE COURT'S EXERCISE OF DISCRETIONARY JURISDICTION.

"A review on writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10.1. There must be "special and important reasons" to grant review. *Id.* Among the reasons that the Court considers in exercising its discretion are:

> (a) When a United States court of appeals has rendered a decision *in*

> *conflict with the decision of another United States court of appeals* on the same matter; or has decided a *federal question* in a way in conflict with a state court of last resort; or has so far *departed from the accepted and usual course of judicial proceedings*, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (b) When a state court or a United States court of appeals has decided an *important question of federal law* which has not been, but should be, settled by this Court, or has decided a *federal question in a way that conflicts with applicable decisions of this Court.*

Id. (emphasis added).

Not one of the above reasons is present here. There is neither a conflict with another U.S. court of appeals nor a federal question presented in Underwager's petition. Rather, Underwager contends that both the district court and court of appeals decisions conflict with *Wisconsin state court precedent.* No such conflict exists. Both decisions are squarely in line with the leading Wisconsin cases on defamation. *See Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1981) *cert. denied*, 459 U.S. 883 (1982); and *Van Straten v. Milwaukee Journal*, 151 Wis. 2d 905, 447 N.W.2d 105 (Ct. App. 1989) *cert. denied*, 496 U.S. 929 (1990).

II. THE SEVENTH CIRCUIT CORRECTLY DECIDED THE STANDARD OF PROOF.

A. *The Seventh Circuit Confined Its Holding to Wisconsin Law.*

The Seventh Circuit properly reviewed the district court's decision granting summary judgment to Toth by evaluating the record *de novo* to determine whether Toth was entitled to judgment as a matter of law. *Woods v. Evansville Press Co.*, 791 F.2d 480, 486 (7th Cir. 1986); *Forum Corp. of North America v. Forum, Ltd.*, 903 F.2d 434, 438 (7th Cir. 1990). The Seventh Circuit applied only Wisconsin law to Underwager's claim. *Underwager v. Salter*, 22 F.3d 730, 734 (7th Cir. 1994). There is no reason for this Court to review the Seventh Circuit's application of Wisconsin law to a garden variety defamation case. *Bishop v. Wood*, 426 U.S. 341, 346 (1976), *overruled on other grounds, Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.").

B. *The Seventh Circuit Correctly Ruled that Wisconsin Law Provides that a Public Figure Plaintiff Must Show Actual Malice.*

Just as he did below, Underwager attempts to convert this routine application of state defamation law into a federal case by turning the law on its head. Underwager contends that Toth's status as a media or non-media defendant determines the burden of proof. This is not the law of Wisconsin. In Wisconsin, the focus is on the *plaintiff's status*. A public figure plaintiff must show "actual malice".

For example, in *Calero*, the Supreme Court of Wisconsin discussed the difference between a "conditional privilege" to defamation under state law and the "constitutional conditional privilege" under *New York Times v. Sullivan*, 376 U.S. 254 (1964). *Calero* at 499-501. The plaintiff was a *private figure* in *Calero*, so the "actual malice" standard did not apply. *Id.* at 504. The court specifically noted, however, that the "actual malice" standard would apply in cases involving "constitutional conditional privileges" such as "comments made about public officers or public figures". *Id.* at 500. (Underwager admits that he is at least a "limited purpose public figure") (*Pet. at 12*). Therefore, the actual malice standard applies to him under *Calero*.

In Denny, the issue was whether the plaintiff was a public figure for purposes of determining whether the "actual malice" standard applied. *Denny*, 106 Wis. 2d at 643. The court applied a two-part test, and concluded that the plaintiff was a *private figure*. Therefore, the "actual malice" standard did not apply.

Van Straten also confirms that a public figure must show "actual malice". "Because of his status as a limited purpose public figure, Van Straten must recite some facts showing that the newspapers printed the statements with actual malice." *Van Straten*, 151 Wis. 2d at 917.

The Seventh Circuit correctly observed that there are no Wisconsin cases involving a public figure plaintiff and a *non-media* defendant (like Toth). *Underwager*, 22 F.3d at 734. This does not mean, however, that Toth's status suddenly determines the burden of proof. For purposes of determining the *plaintiff's* burden of proof in a defamation case, Wisconsin courts have always concentrated on the *plaintiff's* status; not the defendant's.

There is nothing in Wisconsin law that indicates that a lesser burden than "actual malice" should be applied to a public figure who sues a non-media defendant (as opposed to a media defendant), and Underwager offered no arguments in either the district court or the Seventh Circuit as to why Wisconsin should or would. *Id.* at 734-35. Therefore, in the absence of controlling Wisconsin law, the Seventh Circuit correctly decided that the "actual malice" standard was the appropriate burden of proof for a public purpose plaintiff in Wisconsin. *Id.; Propper v. Clark,* 337 U.S. 472, 490 (1949); *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 206 (1938). Petitioners do not appeal the Seventh Circuit's decision-making power in this respect. "Where there is an open question or question of first impression concerning state law obviously a federal court must answer the question." *(Pet. at 15).*

III. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT MULTIPLE PUBLICATIONS DO NOT CONSTITUTE "ACTUAL MALICE".

Under Wisconsin law, multiple publications of an allegedly defamatory statement do not constitute "actual malice". *Van Straten,* 151 Wis. 2d at 917-18 (repeated publication did not establish actual malice when speakers believed their statements to be true). The Seventh Circuit cited this exact precedent in denying Underwager's contention that they did. *Underwager,* 22 F.3d at 736.

The uncontroverted evidence in this case reveals that Patricia Toth (1) believed the statements on the "Mr. Bubbles" episode to be true; (2) was familiar with both the speakers and materials referred to on the program; and (3) read those materials before she played the videotape for the first time at the Madison Seminar. (Declaration of Patricia Toth,

January 28, 1993) (Respondents' Appendix)[1]. Moreover, she replayed a *60 Minutes Australia* television news program that already had been nationally broadcast in Australia. The fact that Toth continued to use the videotape at subsequent seminars proves her belief in its *truth*, not the opposite, as Underwager contends.

CONCLUSION AND REQUEST FOR DENIAL

This case presents no question beyond application of Wisconsin law to the specific facts of a state run-of-the-mill defamation claim. These respondents respectfully request the Court to deny Underwager's Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review and the lower courts' holdings were correct.

Respectfully submitted,

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September 13, 1994

[1]Exhibits A and B to the Toth Declaration are not included in Respondents' Appendix due to printing requirements. They are part of the original record, however, and can be located at Docket Number 113.

RESPONDENTS' APPENDIX

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH UNDERWAGER and
HOLLIDA WAKEFILED,

Plaintiffs,

v. Case No. 92-C-229-S

ANNA SALTER and
PATRICIA TOTH,

Defendants.

DECLARATION OF PATRICIA TOTH

Patricia Toth hereby declares as follows:

1. I am currently employed by the American Prosecutors Research Institute ("APRI") as Director of the National Center for Prosecution of Child Abuse, a position I have held since October, 1987. I make this affidavit upon personal knowledge and in support of Toth's Motion to Dismiss Or, In the Alternative, Motion for Summary Judgment.

2. I played the videotape of the 60 Minutes episode during my workshop entitled "Facts, Fallacies and Hidden

Agendas: Current Issues in Child Abuse Intervention," at the Midwest Conference on Incest & Child Sexual Abuse ("Madison Seminar") held in Madison, Wisconsin in late October, 1990. I started the videotape at the point in the 60 Minutes episode where the program comes back from a commercial break and the video displays the countdown of the numbers 5 through 1.

3. I am a former prosecutor, and I targeted my workshop at the Madison Seminar to professionals involved in child abuse intervention programs and practices. My program was specifically directed toward social workers, case workers, prosecutors, physicians, psychologists and law enforcement personnel.

4. During my workshop, I discussed recently decided child abuse cases, publications and literature about child abuse and child pornography, and experts in the field, including Ralph Underwager. I showed numerous slides of newspaper articles, advertisements and photographs in periodicals. I also played the latter-half of the 60 Minutes episode entitled "Witness for Mr. Bubbles."

5. I played the 60 Minutes videotape because it highlighted four different areas in child abuse intervention and prosecution: (l) the significance of expert witnesses in child abuse cases; (2) the theory used by the defense in the *Barnes v. Barnes* case in Indiana; (3) competing and controversial theories advanced in child abuse psychology; and (4) a brief look at a popular expert in child abuse, Ralph Underwager, and his verbal skills, presence and theories.

6. I feel that the 60 Minutes videotape afforded a unique opportunity for professionals with an interest in child abuse to see how cases are handled. My workshop was about 2 hours long, and the 60 Minutes videotape comprised about 20 minutes of it. It was included among the other audio and

visual presentation of several topics related to child abuse intervention. A true and correct copy of a cassette tape recording of my workshop at the Madison Seminar is attached hereto as Exhibit A.

7. I did not have any knowledge that the statements made by Munro, Peters, Vaughan or Salter in the 60 Minutes episode were false. Rather, I believed their statements to be substantially true, and made this determination before I played the videotape for the first time, which was during my workshop at the Madison Seminar.

8. I worked with Jim Peters at APRI for about 3 years. I had no reason to doubt the truthfulness of Peters' statements, and, in fact, I believed them to be substantially true. I even agreed with the opinions Peters expressed during his interview, and made my determination regarding the truth of Jim Peters' statements before I played the videotape for the first time at the Madison Seminar. Since Peters and I worked at the same office, we had access to many of the same resources and materials about Ralph Underwager. Having reviewed, for example, the *Swan* case, I believe that Peters' comments did not depart from the essence of that case, or the other cases he discussed during his interview.

9. I had no reason to doubt the truthfulness of Charles Vaughan's statements during his interview. In fact, I believed his statements to be substantially true. I believed his statements about Underwager's testimony, and the effect of Underwager's testimony on cross-examination in the *Polly Barnes* trial to be substantially true. National Center for Prosecution of Child Abuse has the transcript of Charles Vaughan's cross-examination of Underwager in the *Barnes* trial, and I have looked at it. Vaughan's statements in his 60 Minutes interview do not depart from the essence of Underwager's trial testimony, or the jury verdict, in the *Barnes* trial. I investigated this fact before I played the videotape of

the 60 Minutes episode at the Madison seminar. Any opinions which Vaughan expressed during his interview — that Underwager must have trouble sleeping at night — are not really capable of objective verification. I simply viewed them as Vaughan's opinions. I do not disagree with Vaughan anyway.

10. I had no reason to doubt the truthfulness of Dr. Salter's statements during her interview on the 60 Minutes episode. In fact, I believed her statements to be substantially true. I have read the Court's opinion in the *Swan* case regarding Underwager's qualifications as an expert, and I believe that Dr. Salter accurately conveyed the Court's opinion in *Swan* during her interview. Furthermore, I respect Dr. Salter's qualifications, and have no reason to doubt her opinions and research in the field of child psychology. For example, I have looked at the "Baurmann" report, and I agree with Dr. Salter that Underwager did not precisely summarize its conclusions. A true and correct copy of the Baurmann report is attached hereto as Exhibit B. Highlighted language on p. 527 reveals the conclusion at issue. Of course, to the extent Dr. Salter espoused professional opinions during her interview, those opinions are not capable of objective verification. I viewed them as her opinions, but I did not consider them to be false. I made my determination as to the truthfulness of her statements before I played the videotape at the Madison Seminar.

11. I had no reason to doubt Michael Munro's statements throughout the 60 Minutes episode. In fact, I believed his statements to be substantially true. Of course, where he expressed opinions and exchanged insults with Underwager, I did not really consider those to be facts capable of objective verification. Although I did not consider his opinions to be false. I had looked at a transcript of Underwager's testimony during the pretrial hearings of the Mr. Bubbles case in Australia, and summaries of

Underwager's testimony in other cases, before I played the videotape at the Madison Seminar. I believed that Munro's comments did not substantially depart from the Mr. Bubbles pretrial transcript or the other cases to which he refers during his interviews. I considered the remainder of the facts he presented to be accurate through my own working knowledge of Underwager.

12. In short, I was very familiar with the subject matter that Munro, Peters, Vaughan and Salter discussed during the 60 Minutes episode, and I believed that each person's statements were substantially true, and accurately reflected the facts regarding Underwager as I knew them to be before I played the videotape for the first time at the Madison Seminar.

I declare, under penalty of perjury, that the foregoing is true and correct.

Dated this 28th day of January, 1993, at San Diego, CA.

/s/ Patricia Toth

Patricia Toth